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CONFLICT OF LAWS TREATMENT OF WARRANTIES AND REPRESENTATIONS IN LIFE INSURANCE POLICIES—PART ONE*

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Problems presented by warranties and representations bulk large in the law of insurance and numerous difficulties have been encountered. Those provisions in the specialized contract of life insurance have resulted in the development of various techniques for dealing with them in what may be styled a general or internal law case. By those terms is meant a non-conflict of laws situation—one in which interstate factors which might give rise to application of choice-of-laws rules are either non-existent or are ignored by the courts in their opinions dealing with concrete facts. By a conflict of laws case is meant one wherein the opinion recognizes and discusses the interstate relationships which require judicial application of conflict of laws rules; through conflict of laws rules a court selects for enforcement the general or internal law rule of the state having dominant contacts with the operative facts of the case. In a conflict of laws situation a court is confronted with probable variances among the internal law rules of the states from which a conflict of laws choice is to be made; it is also faced with variances in the conflict of laws techniques by which the ultimate reference to the internal law rule of one of the states is to be achieved. The situation has become additionally complex because of the fact that numerous states have enacted statutes whose terms cover part—but only a part—of the internal and conflict of laws problems which may be presented.

In developing rules to govern warranties and representations in conflict of laws cases raised by specialized life insurance policies, the courts have expressed themselves in the traditional conflict of laws terminology applicable to contracts in general. Several of these terms may be mentioned: the delivery and place of delivery of the contract; the place of making of the contract;

* This paper forms the basis of a chapter in a forthcoming book on *CONFLICT OF LAWS AND LIFE INSURANCE CONTRACTS*. All rights are reserved.

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the place of performance of the contract; and the place whose law the parties intended to govern the contract. In life insurance cases, at least, the opinions have frequently overlooked the fact that each of these terms is one of multiple meanings; an unnoticed shift in connotations may result in two conflict of laws cases selecting internal law rules leading to diametrically opposite results. Further, courts do not consistently apply any single rule—such as the “place of making rule”—to decide all types of conflict of laws problems raised by life insurance policies. Although present space limitations preclude consideration of the different meanings with which courts have used general phrases for the selection of particular contracts rules to govern different conflict of laws issues, it is the purpose of this article to present a number of conflict of laws problems arising out of warranties and representations in life insurance policies.

This paper consists of three main divisions. As conflict of laws cases reflect and are somewhat conditioned by the rules regarding representations and warranties which obtain in various states, it is useful to review briefly the development of common law principles of general insurance law applicable to this phase of insurance problems. Statutes which substantially change earlier common law rules now exist in the majority of states. As these statutes play an important role in both internal law and conflict of laws cases, it is necessary to outline the scope of current legislation. This background is furnished in the first main division.

The second division deals with the conflict of laws cases in which questions of warranties and representations have been raised. In view of the insurance background indicated in the first part, the second division includes a preliminary evaluation of the factors which underlie the opinions in a very confused branch of the law and the cases are considered in relation to the three rules which govern contracts in the conflict of laws—the rules of the place of making, of the place of performance, and of the intention of the parties.

The third major division, which will appear in the following issue of this law quarterly, continues the examination of conflict of laws cases advanced in the second division but places emphasis upon certain special types of problems.

I. GENERAL INSURANCE RULES

The principles of warranties and representations in the general law of insurance have had an unusual development. These principles were introduced by Lord Mansfield into the body of the common law at a relatively late date, and the rules were originally designed to afford protection to underwriters who might otherwise have been at the mercy of unscrupulous applicants for insurance. In an intermediate stage of development many courts overlooked the original purpose of these rules and so applied them that they over-reached their legitimate object, gave an unjustified advantage to insurers, and became a trap for an unwary insuring public. A reaction occurred which resulted in a judicial re-examination of the principles governing problems of representations and warranties and in legislation. The statutes which were enacted inevitably gave rise to new problems. In various stages of growth of the legal rules governing these questions, conflict of laws problems have been presented to the courts, and judges have necessarily reflected in their opinions the internal law rules which obtained in the states with which the facts had close connection.

The word "warranty" is one of many meanings and in insurance law the term is a misnomer.¹ Before its application in insurance law the term "warranty" had acquired in the law of sales the general meaning of a collateral promise by the seller, rather than a condition to performance of the contract. But as Lord Mansfield effected the transition of insurance from the law merchant into the common law, the term took on the character of a condition to the promise of the underwriter. Insurance at that time was confined to marine risks; frequently the ship or cargo which was to be insured was in distant waters and the underwriters were necessarily forced to rely upon full and fair disclosures by the applicant. Most of the statements made to induce acceptance of the risk were of the utmost materiality and declarations by the applicant which became incorporated into the policy were termed warranties. At the same time that Lord Mansfield was applying common law principles to problems of insurance which had formerly been dealt with as part of the law merchant, he was also forming that part of the law of contracts which deals with conditions. This jurist had held that

1. 3 Williston, *Contracts* (2nd ed. 1936) §673.

express conditions in ordinary contracts must be strictly and literally performed; warranties in the specialized contract of insurance were denominated conditions and strict performance was required. It has been said that warranties were probably introduced into the insurance contract by laymen rather than by lawyers and were adapted to the protection of an infant industry.² However sound some of the decisions may have been when rendered, at the present time they appear unreasonably harsh in their requirement of strict performance.³

Along with the law of warranties Lord Mansfield developed the law relating to representations. Representations were defined as statements which induced the agreement but had not been included in the written contract, and so were distinguished from warranties. A parallel may be drawn between representations in the insurance law and the implied-at-law conditions, also evolved by Lord Mansfield in other branches of contract law, as to which it was held that substantial performance constituted sufficient basis for recovery.⁴ The principle of substantial performance was applied to representations in insurance, as was also the correlative rule that immaterial misrepresentations did not constitute a basis for avoidance of the contract by the insurer. As fraud was not necessary to avoid the contract if the misrepresentation was actually material, neither was fraud a defense when the misrepresentation related only to an immaterial fact.

In an intermediate stage in the development of the law of warranties, courts applied the common law rules first established by Lord Mansfield, and held that most provisions in policies which imposed obligations upon the applicant or recited disclosures made by him constituted warranties. Under common law rules those provisions, and there were many, were required to be strictly performed before recovery would be permitted. The rule was extended from marine insurance to other risk-shifting contracts, including those of fire and life insurance.

2. Patterson, *Warranties in Insurance Law* (1934) 34 Colum. L. Rev. 595.

3. E. g., *Hibbert v. Pigou* (K. B. 1783) Park, *Marine Insurances* (3d Am. ed. 1800) 339, 3 Doug. 224, 99 Eng. Rep. 624; *Kenyon v. Berthon* (K. B. 1778) 1 Doug. 12, 99 Eng. Rep. 10; *De Hahn v. Hartley* (K. B. 1786) 1 T. R. 343, 99 Eng. Rep. 1130.

4. E. g., *Kingston v. Preston* (K. B. 1773) 2 Doug. 690, 99 Eng. Rep. 487, 101 Eng. Rep. 194, 98 Eng. Rep. 606; *Boone v. Eyre* (K. B. 1777) 1 H. Bl. 273, 126 Eng. Rep. 160.

Difficulties multiplied. Near the close of the nineteenth century the phenomenal expansion of insurance in the United States clearly revealed that those common law principles, established when insurance was relatively infrequent and was confined to the peculiar circumstances of marine risks, were unsuited to changing conditions. These common law principles were first established to protect the underwriters from undue advantage taken by applicants. But their literal application by the courts became the means of oppression when unprecedented expansion of the insurance institution included new fields in its assumption of risks, made large sections of the American public insurance conscious, and raised many new problems as well as old problems in great numbers of additional cases.

It has not been uncommon for courts deciding insurance questions in earlier days to point out the practice of draftsmen to multiply warranty clauses for the benefit of the insurers.⁵ Under the terms included in the policy the insured or his beneficiary, because of some trivial departure, would frequently be deprived of the value of the contract. To overcome the unfairness which was resulting from application of recognized rules of insurance law, several approaches developed more or less contemporaneously. When questions of fact were presented, juries frequently found against the insurance company. Some courts frankly construed declarations in the policy in favor of the insured whenever there was opportunity to do so; others, not so forthright, sought to change the apparent meaning of warranty provisions by construction under the guise of an ambiguity, or to narrow the scope of warranties by increasing that of representations. Occasionally it was incorrectly said that warranties related to immaterial points only, or that the doctrine of substantial performance applied to warranties as well as to representations. In relation to health statements recited in life insurance policies, some courts ruled that these disclosures were only matters of opinion. The companies, nevertheless, had a decided advantage in their ability to issue new forms to avoid the effect of the most recent decisions. And as progress was made by liberality in the courts of one state, it was lost by strict construction in another state.

5. This is true even in conflict of laws cases. See, e. g., *Northwestern L. Ins. Co. v. Riggs* (1906) 203 U. S. 243; *Pacific Mut. L. Ins. Co. of California v. Hale* (Tex. Civ. App. 1924) 267 S. W. 282; *Schuermann v. Union Central L. Ins. Co.* (1901) 165 Mo. 641, 65 S. W. 723.

Methods for avoiding limitations of the strict doctrine of warranties were not confined to life insurance but occurred in all branches of insurance. Each of the devices developed to reduce the likelihood of forfeiture because of some breach of warranty upon an immaterial point or because of some innocent misrepresentation occurred first in the general law of insurance but inevitably became a factor in conflict of laws cases. In short, there was the utmost confusion. Although it was recognized that Lord Mansfield should have held that a warranty upon an immaterial provision had no more legal effect than an immaterial misrepresentation,⁶ case law was unable to cope with the situation without the aid of legislation.⁷

One of the greatest developments of insurance law in modern times has been the legislative attack on the doctrine of warranties. As the inadequacy of the judicial machinery to cope with these problems was revealed, a wave of legislation manifested public reaction to evils which were generally attributed to machinations of the insurance companies, with only a few working in the field of life insurance who recognized that the chief source of the difficulty lay in the judicial rules themselves which operated in an unsatisfactory way when applied to types of insurance other than marine, and when applied in large numbers of cases. But it is not to be taken that legislation is universal. In fourteen states⁸ legislation has not generally affected the common law rules in respect to warranties and representations. Even in those states which still follow common law rules, uniformity does not exist in respect to the approach to be taken to these problems. In a few states the strict rules of warranties obtain; in others some degree of mitigation has been achieved by the construction process. On the other hand, in reference to misrepresentations, the statutes of a number of states adopt an even stricter rule than was applied under the English common law and declare that

6. Vance, *The History of the Development of the Warranty in Insurance Law* (1911) 20 *Yale L. J.* 523, 534.

7. Patterson, *Warranties in Insurance Law* (1934) 34 *Colum. L. Rev.* 595.

8. Arkansas (but see Pope's Dig. 1937, §7850, which probably applies only to assessment companies and reaffirms the doctrine of strict warranty); Colorado; Connecticut (but, where copy of application is not furnished, see note 20, *infra*); Florida; Illinois; Iowa (but see 1939 Code §8770, for estoppel in regard to health statements); Maine; Mississippi; Montana; New Hampshire; Oklahoma (but see Harlow's Stat. 1931, §10519 on non-medical contracts); South Carolina (but see note 20, *infra*); Vermont; and West Virginia.

fraudulent misrepresentations upon immaterial points constitute a basis for avoidance of the contract by the insurer.⁹ Nevertheless, it is believed that there is as yet no decision holding that fraudulent misrepresentations upon an immaterial point constitute a defense to an insurer.

In those states having statutes bearing upon these problems, the legislative approach was not confined to a single front but spread along various lines. Several may be mentioned.¹⁰ Some phases of the warranty-representation problem were dealt with in statutes seeking to bring the policy and application together, as by requiring that the policy and application shall constitute the entire contract, or by requiring a copy of the application to be attached to the policy. Statutes providing for incontestability dealt with another phase of the problem. Other statutes provide substantially as follows: "If the age of the insured has been misstated, the amount payable under the policy shall be such as the premium would have purchased at the correct age."

It was noted above that fourteen states have enacted no comprehensive statutes to cover the problems of warranties and representations in life insurance. Statutes which exist in the remaining states may be divided into eight groups in respect to their provisions. Consideration of the internal law cases arising under these statutes and involving their construction is not within the scope of this study,¹¹ but it must be observed that the courts of two states may differ materially in their construction of identically worded statutes. Further, there may exist in the same state several statutes framed without due consideration to their interrelationship. The statutes fall into the following groups.

I. Twenty-one states have statutes providing that in the absence of fraud statements shall be deemed representations and not warranties.¹² For purposes of comparison with current com-

9. For discussion of cases establishing the rules for the various states, see Magaw, *Representations in the Law of Life Insurance* (1937) 11 Temp. U. L. Q. 463 and (1937) 12 Temp. U. L. Q. 55-63.

10. These statutes give rise to special problems which cannot be considered in this paper and citation of the statutes here would serve no useful purpose.

11. For consideration of cases see Magaw, *Representations in the Law of Life Insurance* (1937) 12 Temp. U. L. Q. 55, 64-88, but note divergency between his and the present grouping of statutes, notes 12-20, *infra*.

12. Arizona Rev. Code (Struckmeyer 1928) §1847 (see also note 20, *infra*); California Ins. Code (Deering 1937) §10113; Idaho Code Ann. (Bobbs-Merrill 1932) §40-1303; Indiana Stat. Ann. (Burns 1933 with 1939

pany practices, of one hundred thirteen currently used forms which were examined, the policies of one hundred ten companies include this clause¹³ (and it is included in the application of one additional insurer).

II. Six states have statutes to the effect that all statements shall be deemed representations and not warranties.¹⁴

III. Fourteen states have statutes in which there is a somewhat material overlapping.¹⁵

IV. Nine states have statutes to the effect that no misrepresen-

Supp.) §39-4206; Kansas Gen. Stat. Ann. (Corrick 1935) §40-420, amended by Laws of 1939, p. 405 (and see note 17, *infra*); Louisiana Gen. Stat. (Dart 1939) §4113 (and see note 20, *infra*); Michigan Comp. Laws (Mason 1929 with 1935 Supp.) §12427 (and see note 16, *infra*); Minnesota Stat. (Mason 1927 with 1936 Supp.) §3402 (and see notes 16, 20, *infra*); New Jersey Rev. Stat. (1937) Tit. 17, c. 34, §15; New Mexico Stat. Ann. (Courtright 1929) §71-161, amended by Laws 1941, c. 213, pp. 490, 494; New York Consol. Laws (Cahill 1939 Supp.) c. 882, art. 7, §142 and, on reinstatement, §143, and see also, §§149, 150; North Dakota Comp. Laws (1913 with 1913-1925 Supp.) §6635c, amended by Laws of 1927, p. 277 and, for definitions, see §§6480-6528; Ohio Gen. Code Ann. (Page 1926) §9420, amended by Laws of 1939, p. 679 (and see note 18, 20, *infra*); Oregon Code Ann. (1930) §46-506 and, on fraternal, §46-708 (and see note 14, *infra*); Pennsylvania Laws of 1937, p. 774 (and see note 19, *infra*); South Dakota Comp. Laws (1929) §9340 (and see notes 19, 20, *infra*); Tennessee Code (Williams, Shannon & Harsh 1932) §6179 (and see note 16, *infra*); Texas Stat. (Vernon 1936) §4732 (and see notes 17, 20, *infra*); Utah Rev. Stat. (1933) §43-3-24; Virginia Code (Michie 1936) §4251c (and see note 14, *infra*); Washington Code Ann. (Pierce 1933) §8128 (and see note 18, *infra*); Wyoming Rev. Stat. (Courtright 1931) §57-232. And District of Columbia Code (1929 with 1939 Supp.) tit. 5, c. 7, §220 b (3) (and see note 17, *infra*).

13. Such a provision in the policy, however, would not necessarily be controlling in a conflict of laws case when the contract was made in one of the states having a statute of some one of the succeeding types. From the standpoint of these states, the vice of the clause would undoubtedly consist of its purport to make fraudulent misrepresentations upon immaterial points the basis of avoidance by the insurance company.

14. Georgia Code (1933) §56-908 (and see also §§56-820, 56-821); Kentucky Stat. Ann. (Baldwin 1936) §639; Nebraska Comp. Stat. (1929 with 1935 Supp.) §44-322 (while apparently not within this group, the Nebraska statute is the same in effect; it provides that no misrepresentation or warranty shall avoid unless it deceived the company); North Carolina Code (Michie 1935) §6289 (and see note 20, *infra*); Oregon Code Ann. (1930) §46-131 (and see note 12, *supra*); Virginia Code (Michie 1936) §4220 (and see note 12, *supra*).

15. Arizona listed in notes 12 and 20; Kansas listed in notes 12 and 17; Louisiana listed in notes 12 and 20; Minnesota listed in notes 12, 16 and 20; North Carolina listed in notes 12 and 20; North Dakota listed in notes 12 and 16; Ohio listed in notes 12, 18 and 20; Oregon listed in notes 12 and 14; Pennsylvania listed in notes 12 and 19; South Dakota listed in notes 12 and 19; Tennessee listed in notes 12 and 16; Texas listed in notes 12, 17 and 20; Virginia listed in notes 12 and 14; Washington listed in notes 12 and 18; Wisconsin listed in notes 16 and 19. And District of Columbia listed in notes 12 and 17.

tation shall defeat or avoid the policy unless such misrepresentation is made with intent to defraud or unless the matter misrepresented increased the risk of loss.¹⁶

V. Four states have statutes to the effect that no misrepresentations made in obtaining a policy of life insurance shall be deemed material or render the policy void unless the matter misrepresented shall have actually contributed to the contingency or event upon which the policy is to become due and payable, and whether it so contributed shall be a question for the jury.¹⁷

VI. Two states have statutes to the effect that no false answer shall bar recovery unless it be willfully false, fraudulently made, material, and induced the company to issue the policy.¹⁸

VII. Four states have statutes, either in conjunction with others mentioned above or alone, to the effect that where the medical examiner certifies that an applicant is a fit subject for insurance, the company shall be estopped from asserting that the assured was not in the condition of health required by the policy at the time of issuance or delivery thereof, unless the same was procured by or through the fraud or deceit of the assured.¹⁹

VIII. In thirteen states other miscellaneous statutes of limited scope have been enacted which have some bearing upon the problems of warranties and representations in relation to life insurance.²⁰

16. Alabama Code (Michie 1928) §8364; Delaware Rev. Code (1935) §509, amended by Laws of 1939, p. 150 and, on reinstatement see §496; (1932) c. 175, §186, Minnesota stat. (Mason 1927 with 1936 supp.) §3370. Maryland Ann. Code (Bagby 1924) art. 48a, §87; Massachusetts Gen. Laws (and see notes 12 and 20); Nevada Laws 1941, Art. 5, §49, p. 482; North Dakota Comp. Laws (1913 with 1913-1925 Supp.) §6501 (and see note 12, supra); Tennessee Code (Williams, Shannon & Harsh 1932) §6126 (and see note 12, supra); Wisconsin Stat. (1937) §209.06 (and see note 19, infra).

17. Kansas Gen. Stat. Ann. (Corrick 1935) §40-418 (and see note 12, supra); Missouri Rev. Stat. (1939) §5843; Rhode Island Gen. Laws (Act of April 24, 1931) c. 1757, §12; Texas Stat. (Vernon 1936) §5043 (and see notes 12 and 20). And District of Columbia Code (1929 with 1939 Supp.) tit. 5, c. 7, §217 m (and see note 12, supra).

18. Ohio Gen. Code Ann. (Page 1926) §9391 (and see note 20, infra); Washington Code Ann. (Pierce 1933) §2941 (and see note 12, supra).

19. Iowa Code (1939) §8770; Pennsylvania Stat. (Purdon 1936) tit. 40, §511a; South Dakota Comp. Laws (1929) §§9311, 9312 (and see note 12, supra); Wisconsin Stat. (1937) §209.07 (and see note 16, supra).

20. The following are in addition to statutory types indicated note 10, supra:

Arizona Rev. Code (Struckmeyer 1928) §1849 (on non-medical and certain infants' contracts); Arkansas Digest (Pope 1937) §7850 (statements, representations and answers on part of applicants for membership as to questions of age, etc., shall be construed as warranties; this statute prob-

The foregoing statement of the types of statutes directly concerned with these problems indicates that there is not substantial agreement among the states as to the best approach to these questions. In some instances legislation has apparently conferred upon the insurance companies additional advantages which did not exist at common law; that some statutes treat fraudulent immaterial misrepresentations in the same way that the common law treated warranties is an illustration. In various cases presenting problems of internal law, state courts have construed and upheld the constitutionality of statutes enacted in their own states to liberalize the common law rules applied to warranties. The Supreme Court of the United States, also, has held²¹ that statutes bearing upon representations and warranties are within the police power of the states enacting them in respect to contracts made within their borders; that Court has upheld these statutes as constituting no violation of the privileges and immunities and the due process clauses of the Fourteenth Amendment. The divergencies existing among the rules of many of the states, whether those are common law or statutory rules, constitute a definite part of the factors in conflict of laws cases.

II. APPLICATION OF CONFLICT OF LAWS RULES — IN GENERAL

The conflict of laws cases arising under both common law and statutory rules show that the case must be strong indeed in which the insurance company can overcome the various protective measures which are available in favor of the insured and

ably applies only to assessment companies); Connecticut Gen. Stat. (1930 with 1935 Supp.) §4191 (estoppel where insurer failed to furnish copy of application); Georgia Code (1933) §§56-820, 56-821 (representations covenanted to be true); Louisiana Gen. Stat. (Dart 1939) §4118 (on non-medical contracts); see Note, Life Insurance without Medical Examination in Louisiana (1936) 10 Tul. L. Rev. 629; Minnesota Stat. (Mason 1927 with 1936 Supp.) §3396 (on non-medical and certain infants' contracts); North Carolina Code (Michie 1935) §6460 (on non-medical contracts); Ohio Gen. Code Ann. (Page 1926) §9392 and §§9387-9389 (certain estoppels); Oklahoma Stat. (Harlow 1931 with 1936 Supp.) §10519 (on non-medical and certain infants' contracts) and §10529 (misrepresentation in proof of death); South Carolina Code (Michie 1932) §7987 (insurer may institute proceedings to vacate policy for falsity of representations in application); South Dakota Comp. Laws (1929) §9313 (when insurer may not contest); Texas Stat. (Vernon 1936) §5046 (misrepresentations in proof of death); Washington Code Ann. (Pierce 1933) §3129 (on non-medical and certain infants' contracts).

21. *Northwestern L. Ins. Co. v. Riggs* (1906) 203 U. S. 243; *John Hancock Mut. L. Ins. Co. v. Warren* (1901) 181 U. S. 73; *Continental L. Ins. Co. v. Chamberlain* (1889) 132 U. S. 304.

his beneficiaries. As the problems presented by warranties and representations in both internal and conflict of laws cases have been especially acute, the confusion in the conflict of laws cases is particularly marked. The following pages deal with the operation of various principles in conflict of laws cases, but certain considerations should first be made explicit.

Three principles which run throughout conflict of laws cases in insurance are clearly marked in those dealing with warranties and representations. First, the law of life insurance—represented by both internal and conflict of laws cases—has been characterized by the large number of decisions against insurance carriers. Second, several conflict of laws rules applicable to contracts are available and the courts of no state have been entirely consistent in following any single rule. And, third, most courts for most purposes follow the rule of the place of making of the contract.

The rule of the place of making has its foundation upon the fundamental policy, which every state reflects to a large extent, of using its own general rules to protect its own residents who enter into contracts within its borders. It appears that in most of the reported conflict of laws cases involving problems of warranties and representations the policy was issued to a resident of the forum or, in a few instances, to a resident of some third state other than that of incorporation of the insurance company. In these cases resort to the common or statutory law of the place of residence of the insured has usually been sufficient to ground recovery against the carrier. Since the concept of "delivery"²² can be used to define "the last act necessary to complete the contract" as being equivalent to manual receipt of the document by the applicant, and to connect the policy with the applicant's home-state as "the place of making" of the contract, that connotation of "delivery" has most frequently been accepted by courts for resolving problems of representations and warranties.

In some instances, however, the selection of a choice-of-laws rule in the manner indicated above would result in application of a law which was less favorable to the claimant than if some other basis of selection had been utilized. This will occur in those

22. See Carnahan, *The Delivery of a Life Insurance Policy: Function and Scope of the Delivery Concept for Conflict of Laws Purposes* (1941) 26 Minnesota L. Rev. 50.

instances where the rule obtaining at the insurer's home-state is more favorable to the claimant. In such situations it has not been uncommon for courts to select the rule of the insurer's home-state and the reference has been indicated in several different ways. These cases introduce an element of uncertainty. One possibility is for the court to reject the connotation of delivery which relates to the manual receipt of the policy by the applicant and to find that the contract was "made" at the time some significant act occurred at the insurer's home-office. In these relatively few instances the place of making rule constitutes the basis upon which the decision rests but the principle is applied in an unusual way because of change in content of the words "delivery" or "last necessary act."

Occasionally a statute favorable to the claimant may obtain in the insurer's home-state, and a court may apply that legislation on the ground that "Everywhere, within and without the state which created it, its contracts are limited, construed and sustained according to its charter and the laws which affect its operation."²³ There is also a tendency to refer to rules obtaining at the insurer's home-state in cases presented by certificates of fraternal associations.²⁴

Another basis upon which a court may select rules obtaining in the state where the insurance company is incorporated is use of the rule that problems raised by an insurance policy are to be governed by the law of the place where the contract was to be performed; emphasis upon certain aspects of performance may connect those factors with the insurer's home-state and the law of that place is used to determine all questions before the forum court, whether they relate to performance or not.

A third principle which is available to a court as a basis for selecting rules obtaining in the insurer's home-state is the test of the intention of the parties. It was formerly quite common to insert a clause in a life insurance policy providing that it was made under and to be construed solely by the rules obtaining at the insurer's home-office. As the intention rule has been applied in cases dealing with warranties and representations, it has

23. *Fidelity Mut. L. Ass'n v. Ficklin* (1891) 74 Md. 172, 21 Atl. 680.

This doctrine was quoted with approval and applied in *Fidelity Mut. L. Assoc. v. McDaniel* (1900) 25 Ind. App. 608, 57 N. E. 645, although it was ultimately held that the misrepresentations were material.

24. These cases are considered in the concluding division of this paper.

largely centered upon provisions of this tenor. Some courts have dealt with these clauses in a different manner and have refused to effectuate provisions of that kind; usually the reason was that the law of the place of manual receipt of the policy by the applicant was more favorable to the claimant. In dealing with the cases of the latter group a problem of classification arises. In one sense they constitute a phase of the intention test; in another sense, because the court has refused to apply the intention test, these cases may be classified as applications of the rule of the place of making. It is more useful that the two groups of cases, both dealing with the same type of provision, should be considered in relation to each other than that one be treated with other cases applying the place of making rule, and they are so presented at a later point.

Principles outlined above underlie the conflict of laws cases dealing with the specialized problems of warranties and representations although, in comparison with other aspects of insurance law, they are frequently applied in an unusual way. Cases have been found adopting a wide variety of approaches, and the decisions are presented in the following pages. The shifting emphasis by courts upon various factors will be more clearly followed if some conclusions are here indicated.

The mere examination of a large number of conflict of laws cases dealing with warranties and representations, without classifying the decisions, suggests that the general rules applicable to these problems have been regarded as alternatives and that courts have made use of whichever principle would sustain recovery against an insurer. Indeed, in six jurisdictions the judicial opinions dealing only with misrepresentations and warranties, and hence not showing additional possible differences in other phases of insurance problems, have stated inconsistent rules.²⁵ It is useful, however, in approaching conflict of laws cases dealing with representations and warranties to remember the peculiar development of these doctrines in common and statutory law, to bear in mind the unusually severe consequences from trivial breaches of those rules which frequently occurred, and to recall the reaction which was directed against the application of formerly accepted principles. An examination of even

25. These cases are indicated in the concluding division of this paper, note 138, *infra*.

current statutes shows that uniformity does not exist and that states differ in the extent to which potential misapplication of common law rules has been eliminated. In the light of those considerations, the conflict of law cases dealing with these problems would be unusual indeed if they did not reflect the lack of uniformity existing in the judicial and statutory rules of the various states.

The emphasis which has been placed by various writers upon the fact that most courts, for most purposes, adopt the rule of the place of making should not be allowed to obscure the fact that a number of courts generally follow the rule of the place of performance and others follow the intention test with some degree of consistency. Perhaps part of the apparent confusion would be avoided if it were known that some of the courts which adopt the rules of the place of performance and intention of the parties in warranty and representation cases were but consistently following the same rules which they applied in other problems involving contracts. The reference above to the inconsistency obtaining in six different jurisdictions indicates that the suggestion just made would not resolve all difficulties.

As to the remainder of the cases, it is believed that the courts which generally follow the place of making rule approach problems of warranties and representations with the view that there is a strong presumption that the place of making rule is the proper one to follow and that "the place of making" is the state wherein the policy came into the manual control of the insured. But in instances where application of that rule would be less favorable to the claimant than the rule obtaining at the home-state of the insurance company, the court may apply the law of the latter place. The circumstances that the policy provided that it was made there, or that it was to be governed by the laws of that place, or that it was to be performed there, may be given effect. That effect may be expressed by saying that "the contract was made there," using some connotation of delivery other than that of manual receipt; or by saying that "the contract was to be performed there," with or without specification of the element of performance which is controlling in the particular case; or by saying that "the parties intended" that law to apply. In warranty and representation cases a conflict of laws reference to the law of only two states is available—that of the insurer's home-

office or that of some other state taken as the place of making of the contract. That is, instead of an indiscriminate reference to any law which will sustain the contract and an indiscriminate employment of any available rule, there is strong likelihood that those courts which generally adopt the place of making rule will continue to utilize it in explaining the decision in a warranty or representation case; latitude exists only in instances where the law of the insurer's home-state is more favorable to the claimant, furnishing a basis for the judicial belief that the place of making rule is, in that case, an improper choice-of-laws rule or that a shift from the usual connotation of "making" is justifiable.

Substantially the same idea is expressed, although in an indefinite form, by courts which state that the parties are presumed to contract with reference to the *lex locus contractus*, but, where the contract specifies that it shall be governed by the law of the place of performance, that law will be applied insofar as it does not conflict with rules of policy of the forum.²⁶ Whether the selection of the insurer's home-state, as the one permissible state other than the place of making, is expressed in the opinion in terminology of performance or intention of the parties is immaterial. But if common law or statutory rules of the place of making are more favorable to the claimant then, it seems, that is determinative indication of public policy against application of any other test.

Inconsistency exists only if a premise be taken that all conflict of laws questions are and should be decided by one single rule; inconsistency ceases when it is recognized that courts employ various rules to solve entirely different problems. The peculiar problems raised by divergent principles operating in different states to govern warranties and representations have called for modification of generally accepted techniques in conflict of laws cases. The balance of this main division considers the conflict of laws cases from the standpoint of the three generally accepted rules governing contracts in the conflict of laws—the rules

26. "Parties are presumed to contract with reference to the place of the contract. If it is valid there, it is valid everywhere. * * * where a contract is made in one state to be performed in another, the laws of the latter state govern as to the validity, nature, obligation, and construction of the contract * * *; and they will be enforced by comity, unless contrary to our statute law, our general public policy, or violative of the conscience of the State called on to give it effect." Russell, J., in *Missouri State L. Ins. Co. v. Lovelace* (1907) 1 Ga. App. 446, 465, 58 S. E. 93, 102.

of the place of making, the place of performance, and the law intended by the parties to govern the contract.

1. The factor of the place of making.

Since the internal common law and statutory rules of the place where the applicant resided at the time the insurance policy was issued have usually been most favorable to him, courts have generally applied the law of that place; since manual receipt of the policy usually occurred at the place of the applicant's residence, the delivery concept has generally been employed with that connotation in cases presenting problems of warranties and representations. This has been true whether the forum was the place where the application was made or whether manual receipt of the document occurred while the applicant was resident in another state; the cases dealing with the latter type of situation will be considered near the close of this subdivision.

Although a number of cases mention the circumstance of residence of the applicant within the state where the policy was physically received by him, the opinions do not generally make clear that the courts have considered the factor of residence to be a dominant one for the purposes of allowing recovery; that is left to inference. One characteristic of many opinions is a failure to point out the localization of some of the potentially important factors, such as the residence of the applicant, the place where the policy was delivered, and the place where the insurer was incorporated. These opinions do not make for clarity of the rule or rules applied.²⁷

It has been indicated above that the phrase "place of making" is susceptible of various meanings which may lead to inconsistent results. The connotation of the place of making rule as being the place where the last act was done which was necessary to complete the transaction and bind both parties to it has been utilized in a number of conflict of laws cases to localize the insurance contract and to indicate the law governing problems of representations and warranties.²⁸ But as the phrase "place of

27. See, e. g., *Chamberlain v. National L. & Accid. Ins. Co.* (1934) 256 Ky. 548, 76 S. W. (2d) 628.

28. *Bukowski v. Security Ben. Ass'n* (1935) 221 Iowa 416, 261 N. W. 788; *Limbaugh v. Monarch L. Ins. Co.* (Mo. App. 1935) 84 S. W. (2d) 208; *Hare & Chase, Inc. v. National Surety Co.* (D. C. S. D. N. Y. 1931) 49 F. (2d) 447 (surety bond but "a bond that guarantees against losses is construed as a policy of insurance," *id.* at 453); *Lincoln Nat. L. Ins. Co. v.*

making" is indefinite, so also no single device has been employed in indicating what constitutes the "final act"; frequently the latter is related to "delivery" but it, also, has numerous connotations. The representation and warranty cases reflect this treatment. Opinions expressing localization of the contract for the purpose of dealing with these problems usually employ very general phrases which are themselves mere conclusions. Thus there are found in the opinions such clauses as the following: "The policy was issued and delivered"; "the policy was delivered and the premiums paid"; "the insurance contract was negotiated, the premiums paid and the policy delivered"—to which may be added "where the insured resided," etc.²⁹ Emphasis upon payment of

Hammer (C. C. A. 8th 1930) 41 F. (2d) 12; Metropolitan L. Ins. Co. v. Cohen (C. C. A. 2d 1938) 96 F. (2d) 66.

29. Mutual Ben. L. Ins. Co. v. Robison (C. C. N. D. Iowa E. D. 1893) 54 Fed. 580, affirmed (C. C. A. 8th 1893) 58 Fed. 723 (delivery and payment of premium); New York L. Ins. Co. v. Russell (C. C. A. 8th 1896) 77 Fed. 94 (application made, policy delivered and premiums paid); Provident Sav. L. Assur. Soc. v. Hadley (C. C. A. 1st 1900) 102 Fed. 856, affirming (C. C. D. Mass. 1898) 90 Fed. 390 (approval, acceptance and payment); Fidelity Mut. L. Ass'n v. Jeffords (C. C. A. 5th 1901) 107 Fed. 402 (contract of insurance made, delivered and premiums paid where insured resided); Great Southern L. Ins. Co. v. Burwell (C. C. A. 5th 1926) 12 F. (2d) 244, cert. den. (1926) 271 U. S. 683 (solicited and delivered policy in the state * * * and is licensed to do business in the state); New York L. Ins. Co. v. Webber (C. C. A. 1st 1932) 60 F. (2d) 22, cert. den. (1932) 287 U. S. 662 (application taken in this state provided that insurance was not to take effect until delivery which occurred in this state); Fountain & Herrington v. Mutual L. Ins. Co. of N. Y. (C. C. A. 4th 1932) 55 F. (2d) 120 (policy delivered and premiums paid); Palmquist v. Standard Accid. Ins. Co. (D. C. S. D. Cal. N. D. 1933) 3 F. Supp. 358 (policy applied for, delivered and premiums paid); Mutual Trust L. Ins. Co. v. Ossen (C. C. A. 2d 1935) 77 F. (2d) 317, cert. den. (1935) 296 U. S. 616 (delivery and payment of premium); New York L. Ins. Co. v. Malloy (D. C. N. H. 1938) 21 F. Supp. 1001 (application made, first premium paid and policy delivered); New York L. Ins. Co. v. Levin (C. C. A. 8th 1939) 102 F. (2d) 403 (policy was applied for and was delivered); John Hancock Mut. L. Ins. Co. v. Ramey (1940) 200 Ark. 635, 140 S. W. (2d) 701 (policy issued and delivered to a resident of a foreign state—but insurer failed to satisfy rules of evidence of forum); New York L. Ins. Co. v. Rigas (1933) 117 Conn. 437, 168 Atl. 22 (issued to a resident of the state and it is presumed was accepted by him there); Chamberlain v. National L. & Accid. Ins. Co. (1934) 256 Ky. 548, 76 S. W. (2d) 628 (policy issued and delivered); Mutual L. Ins. Co. v. Mullan (1908) 107 Md. 457, 69 Atl. 385 (delivery and payment of premium); Dolan v. Mutual Res. Fund L. Ass'n (1899) 173 Mass. 197, 53 N. E. 398 (application through local agent and delivery and payment of premium); Coscarella v. Metropolitan L. Ins. Co. (1913) 175 Mo. App. 130, 157 S. W. 873 (insurance contract negotiated, premiums paid and the policy delivered); Schuler v. Metropolitan L. Ins. Co. (1915) 191 Mo. App. 52, 176 S. W. 274 (contract negotiated, delivered and premiums collected in state); O'Maley v. Northwestern Mut. L. Ins. Co. (Mo. App. 1936) 95 S. W. (2d) 852, cert. den. (1936) 299 U. S. 585

the premium is common. Or the court may simply purport to apply the place of making rule without discussing the important factors which connect the policy with the state whose law is chosen.³⁰ And courts have relied upon statutes making a solicitor the agent of the insurer,³¹ or providing that all contracts of insurance for which application is taken within the state (or upon lives within the state)³² shall be taken as made within the state, as necessarily determining the place of making of the contract.

More particularly, when terms in the policy postpone effective operation of the contract until it has been delivered by an agent to the insured while the latter is in good health, there is little difficulty in finding that manual transfer of the instrument is the effective act as to both time and place elements.³³ Or where there is payment in advance to accompany the application and a binder receipt is issued, there is frequently a provision that the policy is to be effective as of the date of the application, if it is approved by the insurer's home-office. In some of these cases it has been held that the place of making is where the application is filled out and the premium is paid;³⁴ in others it has been held that it occurs at the time and place of approval by the home-office officials.³⁵ A provision that the policy should be effective

(on application with provision for delivery in the state, and the policy is so delivered, it is a contract of that state); *Metropolitan L. Ins. Co. v. Lodzinski* (1937) 122 N. J. Eq. 404, 194 Atl. 79 modifying (1936) 121 N. J. Eq. 183, 188 Atl. 681 (applied for, issued and delivered); *New York L. Ins. Co. v. Block* (1893) 6 Ohio Cir. Ct. Dec. 166 (delivery and payment of premiums); *Atlas L. Ins. Co. v. Standfier* (Tex. Civ. App. 1935) 86 S. W. (2d) 852 (application provided policy did not become binding until actual delivery and upon payment of the premium).

30. *Stipcich v. Metropolitan L. Ins. Co.* (1928) 277 U. S. 311, reversing (D. C. D. Oregon 1925) 8 F. (2d) 285; *Royal Union Mut. L. Ins. Co. v. Wynn* (C. C. N. D. Ga. 1910) 177 Fed. 289; *Mutual L. Ins. Co. of N. Y. v. Hilton-Green* (C. C. A. 5th 1913) 202 Fed. 113; *Eichwedel v. Metropolitan L. Ins. Co.* (1925) 216 Mo. App. 452, 270 S. W. 415; *Connecticut Gen. L. Ins. Co. v. Skurkay* (1933) 204 N. C. 227, 167 S. E. 802.

31. *Continental L. Ins. Co. v. Chamberlain* (1889) 132 U. S. 304; *Bank Sav. L. Ins. Co. v. Butler* (C. C. A. 8th 1930) 38 F. (2d) 972.

32. *State L. Ins. Co. v. Westcott* (1910) 166 Ala. 192, 52 So. 344; *Fidelity Mut. L. Ins. Co. v. Miazza* (1908) 93 Miss. 18, 46 So. 817, 136 Am. St. Rep. 534.

33. *Limbaugh v. Monarch L. Ins. Co.* (Mo. App. 1935) 84 S. W. (2d) 208.

34. *Keenan v. John Hancock Mut. L. Ins. Co.* (1929) 50 R. I. 153, 146 Atl. 401; *Atlas L. Ins. Co. v. Standfier* (Tex. Civ. App. 1935) 86 S. W. (2d) 852.

35. *Metropolitan L. Ins. Co. v. Cohen* (C. C. A. 2d 1938) 96 F. (2d) 66. This case, which failed to apply the law of the state in which the application was made and the premiums were paid, and which denied recovery by applying the law of the state of the insurer's home-office, is partially explainable upon the basis that the court there over-looked the fact that a

from 12 o'clock noon standard time at the place where the insured resided was considered highly persuasive that the parties intended the place of effectiveness of the contract to be the residence of the insured.³⁶ If the court interprets an application as calling for a promise to insure, which requires communication of its acceptance, then it has been held not sufficient communication to send information to the soliciting agent through whom the original application had been placed; the result has been to work out the last necessary act at the place of actual notification, the place from which the application was sent.³⁷ So, also, if the application is construed to require actual approval and acceptance of the policy by the insured,³⁸ or if his written acceptance of the policy is contemplated,³⁹ the contract is formed at the place where that act occurs. If the application is not accepted and the insurance company issues a policy variant from that contemplated by the applicant—as by a change in plan or amount of insurance or by rating—this will constitute a counter-offer, and acceptance must be by the act, and at the place, of the insured.⁴⁰ But if the place of making rule is relied on to impose liability, the complaint must allege facts showing the place of making.⁴¹ Countersignature by an agent of the company, while now an unusual provision in a standard life policy, may occasionally become a persuasive factor in determining the place of delivery

binding receipt had been given for the premium. This factor, which might well have been held to connect the contract with the place where the policy was physically received, is an important one. The court emphasized that the contract came into being upon approval by insurance officials, as provided for in the application, and that this constituted the last act essential to a "meeting of the minds of the parties."

36. *Limbaugh v. Monarch L. Ins. Co.* (Mo. App. 1935) 84 S. W. (2d) 208.

37. *Ibid.*

38. *Provident Sav. L. Assur. Soc. v. Hadley* (C. C. A. 1st 1900) 102 Fed. 856, affirming (1898) 90 Fed. 390.

39. *Coverdale v. Royal Arcanum* (1901) 193 Ill. 91, 61 N. E. 915.

40. *Carrollton Furniture Mfg. Co. v. American Credit Indem. Co.* (C. C. A. 2d 1903) 124 Fed. 25; the case involved credit insurance but the court applied a misrepresentation statute relating to "an application for, or policy of, insurance."

41. Allegations that the defendant is a Pennsylvania corporation duly authorized and licensed to transact business in New York, that a policy was executed at its home-office, and that it insured a certain life for a sum paid in advance on the delivery of its policy of insurance, held demurrable in a suit in New York for failure to show that the delivery occurred in New York to make its law of misrepresentations and warranties available. *Mees v. Pittsburgh L. & T. Co.* (1915) 169 App. Div. 86, 154 N. Y. S. 660.

for a policy of health and accident insurance.⁴² Occasionally a court will find a number of factors concurring in pointing to a particular state as the place of making of the contract and the case may be disposed of without detailed consideration of them.⁴³

In most of the warranty and representation cases which employ the place of making test, some basis is given in the opinion for ascertaining the state in which the court found the last necessary act to have occurred; there are some cases, however, which do not indicate this factor and in them resort appears to be had to the internal rule of the forum with the result that the insured recovered.⁴⁴ This may reflect the tendency of some courts to disregard possible conflict of laws features of a case and to decide it upon strictly internal law rules, based only upon an inference that the forum was the place of making of the contract in question.

In a few cases where it appeared that the contract was not entered into within the forum and the court applied the place of making rule, the decision was favorable to the claimant.⁴⁵ On the other hand, the insurance company prevailed in the majority⁴⁶ of warranty cases in which the forum applied the rule of another state as the place where the policy came into the physical control

42. *Pacific Mut. L. Ins. Co. v. Hale* (Tex. Civ. App. 1924) 267 S. W. 282; *Miller v. Maryland Cas. Co.* (C. C. A. 3d 1912) 193 Fed. 343.

43. *Limbaugh v. Monarch L. Ins. Co.* (Mo. App. 1935) 84 S. W. (2d) 208.

44. *Reagan v. Union Mut. L. Ins. Co.* (1910) 207 Mass. 79, 92 N. E. 1025 (the place of making was stated to be either Maine or Massachusetts, with similar result); *Keatley v. Travelers' Ins. Co.* (1898) 187 Pa. 197, 40 Atl. 808 (neither the place of making nor the residence of the insured was stated); *Moak v. Continental Cas. Co.* (1927) 4 Tenn. App. 287 (disability insurance—place of making indicated but forum comes close to applying an internal law rule). See also *Chamberlain v. National L. & Accid. Ins. Co.* (1934) 256 Ky. 548, 76 S. W. (2d) 628 (here the insurer prevailed).

45. *Rauen v. Prudential L. Ins. Co.* (1906) 129 Iowa 725, 106 N. W. 198; *Leonard v. State Mut. L. Assur. Co.* (1905) 27 R. I. 121, 61 Atl. 52, 114 Am. St. Rep. 30 (case remanded for further trial on issues, thus offering advantage to claimant); *Fishbeck v. New York L. Ins. Co.* (1923) 179 Wis. 369, 192 N. W. 170.

46. *New York L. Ins. Co. v. Malloy* (D. C. N. H. 1938) 21 F. Supp. 1001; *New York L. Ins. Co. v. Rigas* (1933) 117 Conn. 437, 168 Atl. 22; *Chamberlain v. National L. & Accid. Ins. Co.* (1934) 256 Ky. 548, 76 S. W. (2d) 628; *Lewis v. New York L. Ins. Co.* (1919) 201 Mo. App. 48, 209 S. W. 625; *Prentiss v. Illinois L. Ins. Co.* (Mo. 1920) 225 S. W. 695; *Mutual L. Ins. Co. of N. Y. v. Wiegmann* (1923) 214 Mo. App. 54, 256 S. W. 505; *Eichwedel v. Metropolitan L. Ins. Co.* (1925) 216 Mo. App. 452, 270 S. W. 415; *Connecticut General L. Ins. Co. v. Skurkay* (1933) 204 N. C. 227, 167 S. E. 802; *Pacific Mut. L. Ins. Co. of California v. Hale* (Tex. Civ. App. 1924) 267 S. W. 282.

of the applicant. An examination of the facts of these cases shows that contacts with the forum were very slight and hardly justify resort to its internal rule in a conflict of laws case.⁴⁷ But while the relatively small number of cases on the latter point makes comparison inconclusive, the decisions do suggest several considerations.

In these instances the facts were such that the denial of liability would be agreed to by most impartial observers; perhaps the misrepresentations appear particularly flagrant. But it must be recognized that neither courts nor juries have taken an entirely impartial attitude in respect to the strict doctrine of warranties. There is at least an equal number of instances, appearing equally flagrant, in which recovery has been permitted by courts and juries in a forum which was also the place of making of the contract. That suggests the possibility that both courts and juries may be more astute to find bases for recovery when the insured was a resident of the forum at the time of inception of the insurance relationship than in cases where the contract was entered into elsewhere. There is the further possibility, which is not always negated by the opinions, that the common law or statutory modification of the strict warranty doctrine obtaining at the place of making of the contract was less favorable to

47. It is clear that there are limits upon the extent to which a forum court may go in failing to apply a rule of law of a sister-state, when dominant contacts are entirely connected with the latter place; considerations of due process of law and full faith and credit to state statutes are significant but are beyond the scope of this article. See Hilpert & Cooley, *The Federal Constitution and the Choice of Law* (1939) 25 WASHINGTON U. LAW QUARTERLY 27; Smith, *The Constitution and the Conflict of Laws* (1939) 27 Geo. L. J. 536; Abel, *Administrative Determinations and Full Faith and Credit* (1937) 22 Ia. L. Rev. 461; Ross, "Full Faith and Credit" in a Federal System (1936) 20 Minn. L. Rev. 140; Corwin, *The "Full Faith and Credit" Clause* (1933) 81 U. of Pa. L. Rev. 371; Ross, *Has the Conflict of Laws Become a Branch of Constitutional Law?* (1931) 15 Minn. L. Rev. 161; Langmaid, *The Full Faith and Credit Required for Public Acts* (1929) 24 Ill. L. Rev. 383; Field, *Judicial Notice of Public Acts under the Full Faith and Credit Clause* (1928) 12 Minn. L. Rev. 439; Dodd, *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws* (1926) 39 Harv. L. Rev. 533; Cook, *The Powers of Congress under the Full Faith and Credit Clause* (1919) 28 Yale L. J. 421; Schofield, *Full Faith and Credit vs. Comity and Local Rules of Jurisdiction and Decision* (1915) 10 Ill. L. Rev. 11; Costigan, *The History of the Adoption of Section I of Article IV of the United States Constitution and a Consideration of the Effect of Judgments of that Section and of Federal Legislation* (1904) 4 Colum. L. Rev. 470. The two most recent pronouncements regarding these clauses are *Griffin v. McCoach* (1941) 61 S. Ct. 1023, and *Klaxon Co. v. Stentor Electric Mfg. Co.* (1941) 61 S. Ct. 1020.

the claimant than corresponding rules in the state where suit was brought. If the home-state of the insured was not favorable to him, a claimant can hardly expect the forum, having no other relationship with the facts, to be more sympathetic. Yet the possibility of the forum court's applying concepts other than the place of making in order to ground recovery, when it was the state in which delivery and payment of the premium occurred, is not unknown. The following subdivisions consider some of those situations.

2. Employment of the place of performance rule.

Several cases dealing with representations and warranties have stressed the importance of the place of performance. In *Seiders v. Merchants' Life Association*⁴⁸ the insurance company had its home-office at St. Louis, Missouri, but it was doing business in Texas where application was made to its local agent, the medical examination was conducted, and where the preliminary papers were forwarded to the home-office. The company issued a policy and mailed it to the agent in Texas for transmission to the applicant. The contract recited: "The Merchants' Life Association * * * does promise to pay to Mary Seiders, wife of the insured, at the home-office of the association in the city of St. Louis * * * within thirty days after receipt and approval by it of satisfactory proofs of the death of Pinkey W. Seiders, Austin, Texas." It may be observed that there were ample contacts upon which it might be held that Texas was the place of making of the contract; and the quoted provision regarding the place of payment is merely a customary one in life policies.

The company defended upon the ground of misrepresentations regarding prior rejections by other insurance companies and of the drinking habits of the insured. There was judgment below in favor of the company which contended that the contract of insurance was made in Texas and was to be governed by its laws. The beneficiary sought reversal upon the ground that, although the contract was made in Texas, it must be interpreted by the laws of Missouri since it was to be performed in that state; Missouri laws included a misrepresentation statute more liberal than that obtaining in Texas. The court agreed with the bene-

48. (1900) 93 Tex. 194, 54 S. W. 753 reversing (Tex. Civ. App. 1899) 51 S. W. 547.

ficiary's contention and held that the lower court erred in not entering judgment for the plaintiff below in conformity with provisions of the Missouri statute because the matter misrepresented did not contribute to the death. The court stated:⁴⁹

Conceding that the contract of insurance was made in Texas, it is made payable at the home office in the State of Missouri, and all premiums are likewise made payable there. It does not provide for any act to be done elsewhere by the company. A tender of the money at the home office would have been valid. Unless there is something in the circumstances which indicate that the parties contracted with reference to the laws of Texas, the legal effect of the contract must be determined according to the laws of the State of Missouri. * * *

It is a well established rule of construction applied to this character of contracts that courts will construe them so as to prevent a forfeiture of the rights of the insured, if it can be done consistently with the terms of the policy and the law, and in case of doubt, the contract will be construed most strongly against the insurance company. Under this rule, the court would, if there were doubt upon the subject, presume that the contract was made with reference to the laws of the State of Missouri, by which the rights of the insured would be protected. The terms of the policy which are invoked to prevent a recovery are harsh, demanding "the pound of flesh," because of misrepresentations which caused no injury and are not entitled to enforcement except in obedience to the mandate of the law. Under the statute of the State of Missouri, the representation made by P. W. Seiders, although false, did not have the effect to avoid the policy, because the matter misrepresented did not contribute to his death, * * *.

This quotation shows clearly that employment of the place of performance test was for the purpose of protecting the beneficiary in what the court felt was a deserving case. One difficulty with the place of performance test lies in the fact that the performances by the parties to the contract may be of various kinds and may occur at various places; and question arises whether it is desirable to relate the effect of misrepresentations and warranties, which do not concern the manner or mode of performance, to the law of the place of performance instead of to the place of making of the contract which was, in this case

49. *Seiders v. Merchants' Life Ass'n* (1900) 93 Tex. 194, 198-199, 200-201, 54 S. W. 753, 754, 755.

at least, clear. The Texas court had no hesitation in so doing, but employment of the place of performance rule for this purpose has been criticized.⁵⁰

A liberal misrepresentation statute obtaining in the state of the insurer's incorporation was also applied in an Arkansas case, *Franklin Life Insurance Company v. Galligan*,⁵¹ which relied upon the rule of the place of performance. The residence of the insured at the time the policy was taken out was not indicated by the court but it may be inferred to have been in Arkansas; application was made for insurance with a Missouri corporation, which issued a policy "signed by its president and secretary, and the corporate seal was affixed, at St. Louis, Mo." It was stipulated therein that premiums should be paid at the home-office, unless otherwise authorized by the insurer's receipt; and, upon death of the insured, it was agreed that payment would be made to the beneficiary at the home-office of the company. In applying the Missouri statute, which was favorable to the beneficiary, the court stated:⁵²

The proof justified the conclusion that the company taking the insurance was a Missouri corporation; that the contract of insurance was a Missouri contract, to be performed in Missouri. Therefore the laws of Missouri governed in its enforcement. * * * Since the law of Missouri governs, the only question is, did the matters alleged to have been misrepresented contribute to the death of the assured. This question was properly submitted to the jury and their verdict should stand.

In *Bottomley v. Metropolitan Life Insurance Company*⁵³ it appeared that insurance had been taken out by a resident of Rhode Island with a New York carrier. The policy was allowed to lapse and was revived by the beneficiary who lived in Massachusetts where suit was later brought. The company relied upon misrepresentations of the beneficiary in effectuating the revival. The Massachusetts court adopted the rule of the place of performance and stated:⁵⁴

50. See 2 Beale, *Treatise on the Conflict of Laws* (1935) §332.3, pp. 1086 et seq.

51. (1903) 71 Ark. 295, 73 S. W. 102, 100 Am. St. Rep. 73.

52. *Franklin L. Ins. Co. v. Galligan* (1903) 71 Ark. 295, 300, 73 S. W. 102, 104.

53. (1898) 170 Mass. 274, 49 N. E. 438.

54. *Bottomley v. Metropolitan L. Ins. Co.* (1898) 170 Mass. 274, 277, 49 N. E. 438, 439.

Not only was the assured a resident of Rhode Island, but the probable place of performance was also there. Certainly it was so at the outset, * * * The place of performance will ordinarily be deemed to be the place of a contract, unless the parties intend otherwise.

It is possible that the policy in the *Bottomley* case may have been silent upon the place of payment of benefits, and thus have been distinguishable from that in the *Seiders* case, but the court did not refer to language of the contract. Without indicating the law of New York, the court applied the law of Rhode Island, where the contract was originally made, to govern the effect of misrepresentations occurring in Massachusetts by which that contract was revived. It is possible that revival in Massachusetts constituted a new contract and the court could have determined whether misrepresentations in effecting it were to be governed by the law of Massachusetts or of New York. In ignoring this possibility and treating the point in issue as determined by the law of Rhode Island, it is apparent that the Massachusetts court adopted a different view of the operation of the place of performance rule from that taken in the *Seiders* and *Galligan* cases. The latter decisions relied upon provisions in the policies to relate performance to the places of the insurers' home-offices; the Massachusetts court in the *Bottomley* case did not consider language in the policy, and presumed that the place of performance was the same as the place of making of the contract of insurance.

While only a few cases have been found employing the place of performance rule in relation to problems of warranties and representations, the use of this device is rather common in certain other types of insurance problems. But the courts of none of the states applying this rule would have been impelled to adopt or to follow it had the rules, from which choice was to be made, been reversed, with the more liberal rule obtaining at the place where the contract was made. The performance rule is generally used to point to the law of the insurer's home-state and, to this extent, is available as an alternative rule which a forum may employ when confronted with facts creating sympathy for the beneficiary; the *Seiders* and *Galligan* cases illustrate the possibility. In those cases the conflict of laws citations given by the courts in support of the chosen rule are in the general field of

contracts—not insurance cases—and particularly cases involving usury as to which there is the greatest flexibility.⁵⁵

Not only is there the greatest lack of uniformity in the decisions by various courts regarding choice-of-laws rules applicable to contracts, but the Supreme Court of the United States formerly following federal common law rules has, at one time or another, followed every possible rule in determining the validity and construction of contracts in the conflict of laws.⁵⁶ Since the forum in the cases presented in this subdivision had important connection with operative facts, there seems no reason to believe that application of the rule of the place of performance would be held by the Supreme Court of the United States to be an unconstitutional exercise of power.

3. The rule intended by the parties to govern the contract.

The rule that a contract will be governed by the law of the place with reference to which it was made is one expression of the so-called intention test as a choice-of-laws rule governing contracts. The rule is a flexible one since a court may find an intention to contract under the law of either the place of contracting or the place of performance as it feels was contemplated by the parties. In problems of warranties and representations the question has been whether a court would apply the intention test to effectuate an express provision in the policy that it was made in the state of the insurer's home-office or that it was to be governed by the law of that place. Several considerations bear upon judicial application of the intention rule to effectuate such provisions.

A substantial number of states have enacted statutes seeking to link the life insurance contract with local law. This legisla-

55. See, e. g., the cases cited in *Seiders v. Merchants' L. Ass'n* (1900) 98 Tex. 194, 199, 54 S. W. 753, 754.

56. See, e. g., as illustrative of the various rules followed, 'although not life insurance cases: (law of domicile) *Union Trust Co. v. Grosman* (1918) 245 U. S. 412; (law of place of making) *Scudder v. Union National Bank* (1875) 91 U. S. 406; (law of place of making or of performance?) *Hall v. Cordell* (1891) 142 U. S. 116; (law intended by parties) *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* (1889) 129 U. S. 397; (law intended by the parties or of place where consideration was given?) *Pritchard v. Norton* (1882) 106 U. S. 124; (usury—law of place of making) *Andrews v. Pond* (U. S. 1839) 13 Pet. 65; (usury—law of place of performance) *Miller v. Tiffany* (U. S. 1863) 1 Wall. 298; (performance—currency valuation of place of breach of contract) *Deutsche Bank Filiale Nurnberg v. Humphrey* (1926) 272 U. S. 517.

tion has taken various forms. Statutes exist providing that all contracts of insurance, the application for which is taken within the state, shall be deemed to have been made within the state, and subject to the laws thereof; or, no insurance company doing business within the state shall make, issue or deliver therein any policy containing any condition, stipulation or agreement requiring such contract to be construed according to the laws of any other state; or, no company or agent shall issue or deliver in this state any policy which conflicts with any provision of this statute.

Although present practice is entirely different, it was formerly quite common to insert a clause in a life policy that it be held made under, or construed solely by, the laws of the state of incorporation of the insurer. While the exact date at which general change was made in policy forms on this point is unknown, it was relatively recent and it is possible that additional cases may yet arise based upon policies containing that clause. These provisions do not seem to have been included in policies issued within the last few years⁵⁷ and, since the incontestability clause bars defenses based upon warranties and misrepresentations within a short period, it is unlikely that new cases involving misstatements will raise questions whether courts will effectuate an express provision that the contract is to be governed by rules obtaining in the insurer's home-state. There may, however, be presented other problems turning around this type of policy provision, and the technique developed in dealing with the clause in warranty cases may carry over into other phases of insurance law.

There are two lines of authorities dealing with this type of provision in conflict of laws cases relating to warranties and representations. In one group of decisions the courts have invoked the intention rule to effectuate the stipulation of governing law contained in the policy. In the other group the courts have struck down the clause. As was pointed out above, the latter line of decisions may be taken as application of the place of making rule, but it has seemed advisable to treat the two groups of cases in conjunction with each other in order to contrast the attitude of courts in dealing with the same policy provisions.

57. The writer has been informed that the Insurance Commissioners of at least two states have required that each policy delivered to a resident of the state contain a clause that the contract is made under and is to be construed by the law of that state.

In a number of instances courts have been quite willing to effectuate an intention of the parties disclosed by a policy provision that the law of the insurer's home-state be applied, and these courts have so ruled although the forum was the place where the insured had applied for and received the policy. In these instances, however, the specified law operated more favorably toward the claimant than would the law of the place of making which, as has been shown, has more usually been employed.

Thus, in *Missouri State Life Insurance Company v. Lovelace*,⁵⁸ suit was brought in Georgia upon a policy issued by a Missouri corporation. The residence of the insured and the place of making were not specified in the opinion but it may be inferred that both were in Georgia; the court did not indicate the Georgia internal law rule but it was less favorable to the insured. The policy stipulated: "This contract shall be governed by and construed according to the laws of Missouri; the place of this contract being expressly agreed to be the home-office of the company." The court stated that parties are presumed to contract with reference to the *lex locus contractus* but, where the contract is made in one state and is to be performed in another, the law of the latter place will be applied insofar as it does not conflict with rules of policy of the forum. Several defenses were advanced: suicide, misrepresentations as to drinking habits, the necessity of attaching a copy of the application to the policy, submission to the jury of materiality of misrepresentations, and nonpayment of premiums. All were held governed by Missouri statutes, and another Missouri statute imposing penalties and attorney fees was likewise applied although Georgia had a similar statute. The position was summarized by the statement that the trial court in Georgia was like a Missouri court—"For this case *pro hac vice*—it is our own law."

While such deference to the specified foreign law is most unusual, it will be noticed that judgment against the company was facilitated by the exercise of this device; the emphasis upon Missouri law—to which the court returned again and again—would hardly have been necessary had the Georgia law been favorable to the insured.⁵⁹

58. (1907) 1 Ga. App. 446, 58 S. E. 93.

59. In *Massachusetts Ben. L. Ass'n. v. Robison* (1898) 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261, the policy contained a clause that the place

In *Fidelity Mutual Life Association v. Harris*⁶⁰ there is statement of a similar rule but, due to the fact that the court did not clearly analyze the factor of the place of making and since the misrepresentation was ultimately held material under either possible rule, the exact meaning of the case is obscure. The policy in question was applied for in Texas through an itinerant agent representing a Pennsylvania corporation; the premium accompanied the application which was forwarded to the home-office, and a policy was issued reciting that it became "effective upon delivery to the insured in good health and payment of the premium." Reference has been made to frequent reliance upon factors of delivery and payment of the premium to connect a contract with local law. The company brought a bill to cancel the policy upon the ground that the insured was suffering from tuberculosis, although it was not shown that he was aware of the fact at the time of application. The insured died *pendente lite* and cross-action upon the policy was instituted by his administrator. The court first considered the law applicable and adopted the rule of the law intended by the parties, concluding that they intended Pennsylvania law to govern. The court then stressed the facts that the premium accompanied the application, and absolute delivery (except for the question of good health) occurred in Pennsylvania; the latter state was said to be the place of making of the contract. It is possible that the court was influenced by the fact that payment of the premium had been made in advance, and that the case is also evidence of a tendency by some courts to treat the place of the insurer's home-office as governing in the binding receipt cases.

The court's reference to the law of the insurer's home-state

of the contract was in the city of Boston, and that the policy was to be governed and construed only according to the laws of the state of Massachusetts. The court stated: " * * * it is true that under the statement in the policy the contract becomes a Massachusetts contract, and is to be dealt with in the same manner as if it had been executed in that state"—and then (the laws of Massachusetts not having been pleaded) the court held that it was unnecessary to inquire into Massachusetts law, the matter of misrepresentation being properly submitted to the jury under the Georgia rule of procedure. The same approach was taken in *John Hancock Mut. L. Ins. Co. v. Yates* (1936) 182 Ga. 213, 185 S. E. 268, affirming (1935) 50 Ga. App. 713, 179 S. E. 239, where the sister-state law was pleaded; the decision in the state court was reversed by the Supreme Court of the United States under the full faith and credit clause in (1936) 299 U. S. 178.

60. (1900) 94 Tex. 25, 57 S. W. 635, 86 Am. St. Rep. 813.

is similar to the result in the *Lovelace* case, since it appeared that in Texas the strict rules on warranties then obtained while Pennsylvania had a statute requiring that a misrepresentation must be material in order to avoid the policy. It was found, however, that the misrepresentation was in fact material. In these circumstances it appears questionable whether the Pennsylvania law would have been taken as applicable had Texas followed a rule as liberal as that of Missouri in the *Lovelace* case and had Pennsylvania adhered to the common law doctrine of warranties.

In the well-known case of *Penn Mutual Life Insurance Company v. Mechanics' Savings Bank & Trust Company*⁶¹ it was held that a life insurance policy issued upon an application which expressly provided that the contract was to be taken as made at the home-office of the company was to be governed by the laws of that state, although the insured was a resident of a different state at the time of making of the application; a liberal statute obtaining in the insurer's home-state was applied.

Effect was also given to the law specified in the policy, which was favorable to the claimant, in a decision by the Virginia court.⁶²

On the other hand, based upon considerations indicated above, when construction of a policy containing an express provision for governing law has come before a court of the state where the contract was made, and where the laws were more favorable to the claimant, the result has been to strike down the provision as invalid. The basis for this consequence is clearly indicated in the language of the Maryland court, per Worthington, J.:⁶³

* * * we deem it against public policy to permit a contract of insurance made here since the passage of the Act of 1894 with a citizen of this State, to be governed by the harsh rules of the common law which by legal presumption merely, is supposed to obtain in the State of New York by whose laws it is sought to have this contract construed.

When a corporation undertakes to do business beyond the territorial limits of the State creating it, it does so merely by comity, and the State which it enters for the purpose of

61. (C. C. A. 6th 1896) 72 Fed. 413.

62. *Union Central L. Ins. Co. v. Pollard* (1896) 94 Va. 146, 26 S. E. 421, 36 L. R. A. 271, 64 Am. St. Rep. 715.

63. *Mutual L. Ins. Co. v. Mullan* (1908) 107 Md. 457, 462-463, 69 Atl. 385, 387. It may be noted, however, that the misrepresentations were held material, even under the more favorable rule of the place of making.

transacting business therein, has the power to require such corporation to carry on its business there subject to its statutes, and this Court will not allow the parties to such contracts as this, by any stipulations contained therein to contravene the salutary provisions of this statute intended for the protection of our own citizens against common law warranties.

In a Pennsylvania case, *Keatley v. Travelers' Insurance Company of Hartford, Conn.*,⁶⁴ the contract stated: "This policy shall be held as of Connecticut issue and construed solely by Connecticut law." The court held that the purpose of the statute of Pennsylvania—the place of making—was to strike down "literal warranties, so far as they may be resorted to for the disreputable purpose of enforcing actually immaterial matters * * *. It would be contrary to public policy to recognize the right of parties to circumvent the law by setting up a waiver such as is insisted on in this case."⁶⁵

Similar applications of the rule are found in a number of decisions of state courts⁶⁶ involving representations and warranties and also in decisions by federal courts⁶⁷ purporting to apply the rule of the place of making. It will be noted that in each of these cases the law of the place of making was more favorable to the insured than the law specified in the contract, and also that in each instance the case came before a court in the state where the contract was found to be made, or before

64. (1898) 187 Pa. 197, 40 Atl. 808.

65. Three months before the application, insured had had an attack which several physicians stated was apoplexy, paresis or partial paralysis; the patient recovered in two or three weeks and physicians then said it was improbable that he could have had either paresis or apoplexy. He had been a drinker but claimed to have stopped; one doctor had told him if he did not stop drinking he would die. The materiality of these facts was held for the jury. The cause of death is not shown in the report.

66. *State L. Ins. Co. v. Westcott* (1910) 166 Ala. 192, 52 So. 344; *Dolan v. Mutual Res. Fund L. Assoc.* (1899) 173 Mass. 197, 53 N. E. 398; *Harwood v. Security Mut. L. Ins. Co.* (1928) 263 Mass. 341, 161 N. E. 589; *Fidelity Mut. L. Ins. Co. v. Miazza* (1908) 93 Miss. 18, 46 So. 817, 136 Am. St. Rep. 534 (but cf. *Fleming v. Grimes* (1926) 142 Miss. 522, 107 So. 420, 422, 45 A. L. R. 618, where the court stated: "The policy here involved is a New York contract and the decisions of that state are pertinent"); *New York L. Ins. Co. v. Block* (1893) 6 Ohio Cir. Ct. Dec. 166.

67. *Fletcher v. New York L. Ins. Co.* (C. C. E. D. Mo. 1882) 13 Fed. 526; *New York L. Ins. Co. v. Russell* (C. C. A. 8th 1896) 77 Fed. 94; *Mutual Ben. L. Ins. Co. v. Robison* (C. C. N. D. Iowa E. D. 1893) 54 Fed. 580, affirmed (C. C. A. 8th 1893) 58 Fed. 723; *Great Southern L. Ins. Co. v. Burwell* (C. C. A. 5th 1926) 12 F. (2d) 244, cert. den. (1926) 271 U. S. 683.

a federal court sitting in that district. These cases striking down a provision for governing law, inserted by draftsmen in the hope that courts would effectuate an expressed intention of the parties, constitute another manifestation of the general rule that courts will protect residents of the forum in their dealings with foreign insurance companies. In these instances the courts were apparently well aware of the fact that insurance contracts are sold and not bought, that they do not result from equal bargaining, and that the applicant must merely "adhere" to the terms of the contract tendered to him by the insurance company. It is also worthy of note that in these instances, with two exceptions in which the misrepresentations were held material even under the rule obtaining at the place of making,⁶⁸ the decisions were adverse to the insurer.

(To be concluded in the February number.)

68. *Mutual L. Ins. Co. v. Mullan* (1908) 107 Md. 457, 69 Atl. 385 and *Dolan v. Mutual Res. Fund L. Ass'n* (1899) 173 Mass. 197, 53 N. E. 398.